

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2003-000111-001 DT

11/07/2003

HONORABLE MICHAEL D. JONES

CLERK OF THE COURT
P. M. Espinoza
Deputy

FILED: _____

STATE OF ARIZONA

FAITH C KLEPPER

v.

DAVID W WESTALL (001)

DAVID J MALETTA

NORTH MESA JUSTICE COURT
REMAND DESK-LCA-CCC

MINUTE ENTRY

NORTH MESA JUSTICE COURT

Cit. No. #A520569

Charge: A) DUI-LIQUOR/DRUGS/VAPORS/COMBO
B) DUI-W/BAC OF .08 OR MORE

DOB: 02/19/76

DOC: 07/13/02

This Court has jurisdiction of this criminal appeal pursuant to the Arizona Constitution Article VI, Section 16, and A.R.S. Section 12-124(A).

This case has been under advisement since its assignment on October 10, 2003. This decision is made within 60 days as required by Rule 9.9, Maricopa County Superior Court Local Rules of Practice. This Court has considered and reviewed the record of the proceedings from the North Mesa Justice Court, the exhibits admitted, and the briefs of counsel.

Appellant, David Westall, was accused of the following crimes alleged to have occurred July 13, 2002: (1) Driving While Under the Influence of Intoxicating Liquor, a class 1
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misdemeanor in violation of A.R.S. Section 28-1381(A)(1); and (2) Driving with a Blood Alcohol Content of .08% or Greater, a class 1 misdemeanor in violation of A.R.S. Section 28-1381(A)(2). Appellant entered not guilty pleas to these charges and the cases were set to trial. However, prior to trial Appellant filed a Motion in Limine requesting that the trial court suppress results of the Intoxilyzer 5000 based upon his claim that the State would be unable to lay the legal foundational prerequisites for the introduction of the breath test results. An evidentiary hearing was held on this motion before the Honorable Lester Pearce, North Mesa Justice of the Peace on January 22, 2003. Both parties called expert witnesses to testify before the court. The expert witness testimony could not have possibly contained more major disagreements between the experts. Chester Flaxmeyer testified for Appellant and his opinion the Intoxilyzer 5000 was not operating properly on the date of Appellant's breath test. Kristin Rogers, a criminalist for the State, testified for Appellee that in her opinion the machine was operating properly at the time of Appellant's test. Rogers testified that based upon before and after calibration and quarterly checks, on the Intoxilyzer 5000, she believed the machine was operating properly and accurately. The trial judge denied, by a minute entry dated January 24, 2003, the Appellant's motion in *limine* or motion to suppress the breath test results. Thereafter, the parties submitted the case to the court upon stipulated evidence, and Appellant was found guilty of both charges. A timely notice of appeal was filed by Appellant after sentencing.¹

The standard of review which this court must utilize in reviewing a trial judge's order admitting or suppressing evidence is abuse of discretion.² Preliminary questions of law to be determined by the trial judge pursuant to Rule 104(a), Arizona Rules of Evidence. And, the standard that must be used by a trial judge in conducting a preliminary inquiry pursuant to Rule 104, Arizona Rules of Evidence, "should be limited to asking whether the evidence in the record...would permit a reasonable person to believe" the evidence on the preliminary issues presented for determination.³

The record in this case does reflect the state established necessary foundational elements are a prerequisite for the admissibility of a breath test pursuant to A.R.S. Section 28-1323(A) (the "statutory method"). The record also reflects that the breath test results would be admissible pursuant to Rule 702, Arizona Rules of Evidence (the "Deason method").⁴ The evidence clearly establishes from the testimony of Kristin Rogers that evidence exists that would permit a reasonable person to believe that the evidentiary foundational prerequisites existed to permit the introduction at trial of the Intoxilyzer 5000 breath test results. Appellant essentially argues that the State's witness, Kristin Rogers, is not to be believed in the face of the testimony presented by

¹ Appellee's claim that Appellant has waived all non-jurisdictional defects by a guilty plea is not supported by the record in this case. Rather, it appears that the parties submitted this case for determination of guilt or innocence to the trial court upon stipulated evidence without a jury. It does not appear from the record that any guilty plea proceeding occurred.

² State ex.rel McDougall v. Municipal Court of the City of Phoenix, 153 Ariz. 111, 735 P.2d 141 (App.1986).

³ State v. Plew, 155 Ariz. 44, 49-50, 745 P.2d 102, 107-08 (1987), as quoted in State ex.rel McDougall v. Superior Court in and for County of Maricopa, 172 Ariz. 153, 155-56, 835 P.2d 485, 487-88 (App. 1992).

⁴ See State ex.rel Collins v. Seidel (Deason, Real Party in Interest), 142 Ariz. 587, 691 P.2d 678 (1984).

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its own expert, Chester Flaxmeyer. However, this trial of the experts is not a matter for the judge to resolve conclusively in determining issues of preliminary admissibility of evidence. Rather, it is a matter for the jury to evaluate and consider. A jury would be in a unique position to evaluate the credibility of each expert and the reasons offered for their expert opinions. The trial judge correctly noted in his decision denying the Appellant's motion:

Issues raised by defense counsel go to the weight of the evidence, not the admissibility of the evidence, and are not grounds for suppression.⁵

This Court finds no error by the trial judge in denying Appellant's Motion in Limine/ Motion to Suppress.

IT IS ORDERED affirming the findings of guilt and sentences imposed by the North Mesa Justice Court.

IT IS FURTHER ORDERED remanding this case back to the North Mesa Justice Court for all further and future proceedings in this case.

/ s / HONORABLE MICHAEL D. JONES

JUDICIAL OFFICER OF THE SUPERIOR COURT

⁵ Record on Appeal, Minute Entry of January 24, 2003.